# Canadian Association of Labour Lawyers /

# Association Canadienne des Avocats due Mouvement Syndical

## A BRIEF TO THE SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

**April 2015**

Bill C-377

# I. Introduction

1. The Canadian Association of Labour Lawyers/ Association Canadienne des Avocats due Mouvement Syndical ("CALL/ACAMS") submits this Brief in order to voice our concerns about Bill C-377, a private member's bill brought by Conservative MP Russ Hiebert.

2. CALL/ACAMS is a national organization of lawyers who represent unions or work directly for them. We provide educational and informational resource for our members. Beyond that, the purposes of CALL/ACAMS include defending and promoting the principles of freedom of association and improving the physical, emotional, cultural and material well-being of Canadian workers and their families, as well as promoting their legal interests.

3. Mr. Hiebert has stated that the purpose of Bill C-377 is "to increase transparency and accountability" in labour unions, and to allow Canadians "to gauge the effectiveness, financial integrity and health of Canada's unions".[1]

4. Considering the level of accountability that unions already have to their members, and the existing disclosure requirements under provincial and federal law, it is unclear exactly what problem Mr. Hiebert is identifying and responding to with his Bill. In any event, we do not believe that Bill C-377 represents an appropriate response to the issue as it has been identified by Mr. Hiebert. In fact, we believe that this Bill is so fundamentally flawed that it must be rejected.

5. Although CALL/ACAMS has concerns about many features of this Bill, there are certain aspects of it which we find especially troubling. Canada is a democratic country that holds itself out to the world as a protector of fundamental freedoms, rights, and the rule of law. As we set out more thoroughly below, CALL/ACAMS submits that this Bill is not consistent with those values. It unjustifiably impacts on solicitor-client privilege and confidentiality, erodes freedom of expression and freedom of association, and may be unconstitutional in its entirety.

6. When this Bill was placed before the Senate in 2013, its fundamentally flawed nature led to a bi-partisan rejection of its terms, with Hugh Segal, a Conservative senator, tabling amendments which made Bill C-377 into a far less draconian piece of legislation. We ask that the present Senate Committee again reject this poorly considered and wholly unconstitutional Bill.

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[1] www.c377.ca.

## II. Impact of Bill C-377 on Solicitor-Client Privilege and Confidentiality

7. In its present form, the Bill requires "[e]very labour organization and every labour trust" to file a "public information return" within six months of the end of each fiscal period. The information that must be filed includes a set of statements for the fiscal period setting out all transactions and disbursements over $5000, including the name and address of the payer and payee, the purpose and description of the transaction, and the specific amount that has been paid or received.

8. There are a series of specific types of expenditures which must be disclosed, including a statement of disbursements and any kind of consideration provided to officers, directors, trustees, employees and contractors. The relevant organization must also disclose a set of statements on the amounts spent on labour relations activities, lobbying activities, organizing activities, and collective bargaining activities. Finally, the organization must produce a set of statements on legal activities. Bill C-377 exempts the disclosed information from the protections that section 241 of the *Income Tax Act* normally puts on information filed with the tax authority, and instead mandates that such information will be made publicly available by the Minister.

9. Thus, Bill C-377 purports to require the public disclosure of a statement which sets out the following information:

    a. the fact that money was spent on a legal activity by the union or labour trust;
    b. the precise amount of money that was paid;
    c. the name and address of the payor;
    d. the name and address of the payee;
    e. the purpose of the transaction; and
    f. a description of the transaction.

10. The Bill is so carelessly worded that it is impossible to determine exactly what information will have to be disclosed. Although the Bill excludes "information protected by solicitor-client privilege" from being disclosed within the "statement of disbursements on legal activities" mandated by section 149.01(3)(b)(xix), CALL/ACAMS believes that this insufficiently addresses our concerns about solicitor-client privilege.

11. CALL/ACAMS submits that *any* forced disclosure of amounts spent on legal activities would be a violation of solicitor-client privilege. Although the protection of solicitor-client privileged information may be sufficient to largely assuage the concerns of a large union that spends a great deal on legal services, it clearly would still create issues for small locals with limited numbers of employees. Those locals may not typically consult any lawyers at all for years at a time, and that would mean that when they do consult a lawyer, and are forced to disclose it, the employer might know exactly what is being discussed. It would allow the employer to prepare and perhaps open the employees up to reprisals. Such disclosure could have a chilling effect on the "full and unreserved

communication" that is the basis for a productive lawyer-client relationship as well as the reason for the privilege that attaches to such communications.

12. The precise nature of the disclosure requirement and the extent to which it infringes solicitor-client privilege and confidentiality will depend on the interpretation of the words "purpose and description of the transaction". The Bill will at the very least require the disclosure of a statement that says that the labour organization or labour trust engaged a lawyer to give legal advice or do other legal work and paid a certain amount for that service.

13. However, the Bill could also be interpreted to require the disclosure of the nature and object of the legal advice sought and in what context. The latter interpretation seems to be the more likely one, as if the labour organization or trust is required to disclose a statement on "legal activities" which sets out the "purpose and description" of each transaction, the "purpose and description" would likely need to say more than just "legal advice" or "legal work" as only requiring such a general description would be redundant considering the nature of the statement. If the statement is already called "Legal Activities", giving a very general "purpose and description" of the transaction would not add any more information. Since the legislature is always taken to choose words with purpose, the "nature and description" requirement would seem to call for more detail than simply a general statement.

14. Requiring such disclosure does not comport with the value that governments, courts and law societies across Canada have placed on the importance of confidentiality of lawyer-client communication.

15. Ontario's *Rules of Professional Conduct* require that "[a] lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship".[2] The commentary that the Law Society of Upper Canada has included with this rule states that:

> A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.[3]

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[2] Rule 2.03(1).

[3] This same commentary exists in the professional responsibility codes of other provinces as well. See, for example, British Columbia, *Code of Professional Conduct*, Commentary in Chapter IV.

16. The notion that "effective professional service" requires "unreserved communication" is well established in Canadian jurisprudence. The same idea has been expressed by the Supreme Court of Canada, who have noted that:

> The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.[4]

17. The requirement that lawyers will keep confidential all information that they have received from clients, and that they cannot be compelled to disclose any advice that they have offered or confidential information that they have learned, is fundamental to the adversarial system. The Supreme Court has stated that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance".[5] Bill C-377 erodes that confidence.

18. The disclosure mandated by Bill C-377 offends that principle and will lead, in the context of labour relations, to information asymmetries that will prejudice unions and labour trusts and privilege employers and anti-union groups. Employers, anti-union groups and employers' associations will have knowledge of the legal affairs of the unions. Unions, on the other hand, will not have any knowledge of the nature of the legal services that are being provided to their adversaries. This is unjustified, offends the sanctity of solicitor-client communication, and is contrary to the rule of law. It is absurd that a private members' bill could lead to unions and labour trusts being forced to disclose the nature of their relationship with their legal counsel to the government and the public.

19. Bill C-377 is an unjustifiable intrusion into a relationship that is fundamental to our adversarial system. This is one of the reasons why we believe that the Bill should be rejected. CALL/ACAMS believes that, at the very least, in order to not endanger solicitor-client privilege and not create unnecessary and unjustified cost, the section which calls for disclosure of a statement of disbursements on legal activities must be removed.

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[4] *R. v. McClure*, [2001] 1 S.C.R. 445.

[5] Ibid., at para. 35.

## III. Impact of Bill C-377 on Freedom of Association

20. The Charter of Rights and Freedoms, in section 2(d), protects "freedom of association". While the question of whether Bill C-377 is unconstitutional on the basis of its impact on freedom of association is complicated, the Bill clearly does not comport with the values that section 2(d) is meant to protect.

21. The importance of collective bargaining and freedom of association is illustrated in the preamble to the *Canada Labour Code*:

> Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations…

22. There are two ways in which Bill C-377 can be seen to impact on the freedom of association of Canadian workers.

23. First, since it will lead to the public disclosure of a multitude of information about Canadian unions, freedom of association and collective bargaining will be compromised insofar as employers and anti-union groups will be at a significant advantage when bargaining, responding to certification applications, and dealing with grievances and other legal proceedings.

24. Bill C-377 will give employers and anti-union groups the ability to get extremely detailed information about all aspects of a union's financial and administrative health. They will know exactly what the union spends its money on, and will be able to gauge the strength of that union and their ability to resist the negotiating strategies of the employer. The threat of a strike, for example, becomes much less powerful if the employer knows that the union has no funds to provide their members with strike pay.

25. Bill C-377 will have a clear impact on the ability of unions to collectively bargain on their members' behalf. As noted by the Supreme Court of Canada in the recent case of *Mounted Police Association of Ontario v. Canada*, the Charter's guarantee of freedom of association "functions to protect individuals against more powerful entities".[6] Bill C-377 will assist employers in continuing to dominate what is already an unequal relationship, and this is contrary to the values enshrined in the Charter, especially in section 2(d).

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[6] 2015 SCC 1, at para. 58.

Freedom of Association is guaranteed for a reason in Canada. The Supreme Court has stated as follows:

> The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

26. By further shifting power away from unions and toward employers, Bill C-377 offends the freedom of association that the Charter of Rights and Freedoms protects. Since this is a value that our society has decided is in need of protection, CALL/ACAMS submits that the Federal Parliament should not even be considering such legislation.

27. The second way in which the Bill impacts freedom of association is in the differential treatment of unions and their members when compared to the treatment that other similarly situated groups and organizations receive.

28. Russ Hiebert has identified the tax advantages that unions receive as the justification for requiring such extensive public disclosure. However, there are many other organizations that receive tax advantages which are not subject to the same kind of financial disclosure as that required by Bill C-377. For example, charities, while subject to some disclosure requirements, do not have nearly the same disclosure requirements as Bill C-377 envisions for unions. The same could be said about churches, fraternal organizations and other non-profit groups.

29. Furthermore, the income tax system contains a myriad of tax expenditures which are designed to encourage certain behaviour, but which do not lead to a corresponding duty of public disclosure. Tax credits provided to corporations are a good example of this.

30. The tax system provides benefits to many different types of organizations, but it is only those organizations which are designed to counter the power imbalance between employers and employees which would be forced under Bill C-377 to publically disclose the minutiae of how they spend their money. It is hard to see how such differential treatment can be justified, and Mr. Hiebert has not identified any basis on which it can be.

31. On the contrary, at the Second Reading of the Bill, Mr. Hiebert explained why he believed it was appropriate to target unions in this manner when other similarly situated groups were not being so targeted. He noted that perhaps "it is time to review the public disclosure requirements that other types of institutions receiving public benefits face and determine if they also need improving…however, this private member's bill deals exclusively with labour organizations, which have never been subject to public disclosure."

32. Despite the fact that his private member's Bill could have been drafted in a general manner which would have required public disclosure from any institution which is exempt from paying income tax or which receives a tax credit, Mr. Hiebert chose to target labour unions. It is difficult to see this as anything but an attack on the constitutionally protected right of workers to join together and collectively bargain. His comment that it may be time to look at other institutions does not counter the fact that it is only labour organizations that are being targeted in this manner. Given this differential treatment, it is hard to see this as anything but an attempt to weaken unions and limit freedom of association. The true object of this Bill is therefore in no relation with income taxation and cannot be considered a valid exercise of the Parliament's legislative powers.

## IV. Impact of Bill C-377 on Freedom of Expression

33. Although the Bill clearly has a detrimental impact on freedom of association, it may have an even greater impact on the freedom of expression of union members, their leaders, and the unions themselves. The Bill would require a statement of disbursements on "political activities" and "lobbying activities", as well as detailed summaries of the purpose and description of those expenditures. This is a clear infringement of freedom of expression.

34. According to the Supreme Court of Canada, the guarantee of freedom of expression has three key rationales: democratic discourse, truth-finding and self-fulfillment.[7] The first rationale is considered the "foremost" rationale for the protection, and the Supreme Court has stated that "free expression is essential to the proper functioning of democratic governance".[8]

35. There is no justification for compelling information about the political speech of unions and their members to be made publically available on a government website. There is certainly a rationale for making information about how the union spends money available to the union members themselves, but such information is already available to those members through provincial labour legislation.[9]

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[7] *Grant v. Torstar*, [2009] 3 S.C.R. 640, at. para. 47.

[8] *Ibid.*, at para. 48.

[9] See, for example: *Canada Labour Code*, s. 110; Ontario's *Labour Relations Act, 1995*, s. 92; New Brunswick's *Industrial Relations Act*, s. 139; Newfoundland and Labrador's *Labour Relations Act*, s. 143; Nova Scotia's *Trade Union Act;* and Quebec's *Labour Code*, s. 47.1.

## V. Impact of Bill C-377 on the Right to be Free from Unreasonable Search and Seizure

36. Bill C-377's onerous and unjustified disclosure requirements may also breach section 8 of the *Charter*, which recognizes that "[e]veryone has the right to be secure against unreasonable search or seizure." As Justice La Forest noted in *Thomson Newspapers Ltd*, section 8 protection is rooted in Canadian society's belief that the guarantee of the right to privacy is essential "for the individual to determine the manner in which he or she will order his or her private life...what persons or groups he or she will associate with, what books he or she will read."[10]

37. According to the Supreme Court, an overly broad "intervention of the eyes and ears of the state can undermine the security and confidence that are essential to the meaningful exercise of the right to make such choices."[11]

38. Requiring unions and labour trusts to disclose information to the state and then have such information subject to publication would seriously undermine the values that section 8 of the Charter is meant to protect. The Supreme Court of Canada, both in *Thomson Newspapers* and *McKinlay Transport Ltd*, held that forcing a person to give up documents to the state was no different than the state taking them. Both acts constitute 'seizure' within the meaning of section 8.[12]

39. While the forced disclosure of business records subject to regulatory legislation has tended to produce a "more flexible standard of reasonableness" and a lower expectation of privacy, so as not to breach section 8, the kinds of detailed records that Bill C-377 require disclosed may very well contain information about "one's lifestyle, intimate relations or political or religious opinions." Bill C-377 demands the disclosure of political donations and lobbying activities, information that speaks directly to an individual's identity. Government legislation seeking to collect these details certainly violates the spirit of section 8 of the *Charter*, and will impact on interests that section 8 was meant to protect.

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[10] [1990] 1 S.C.R. 425.

[11] *Ibid.*

[12] *Ibid.*; [1990] 1 S.C.R. 627.

## IV. Bill C-377 is Ultra Vires the Federal Parliament

40. Other than in those industries that are regulated by the Federal Parliament, jurisdiction over labour relations rests with the provinces. This was confirmed in 1925 in the case of *Toronto Electric Commissioner v. Snider,*[13] and remains no less true today.

41. Mr. Hiebert's original private member's bill – Bill C-317 – purported to take away tax exempt status from non-compliant unions. Although typically jurisdiction over labour relations matters falls under the jurisdiction of the provinces (under the heading of "property and civil rights in the province"[14]), Bill C-317 avoided that issue by denying tax exempt status under the *Income Tax Act*, and thus positioning the legislation within the Federal Parliament's head of power under s. 91(3) of the Constitution Act, 1867, "The raising of Money by any Mode or System of Taxation".

42. Bill C-377 also seeks to amend the *ITA*, but it is hard to see how imposing a monetary penalty for failing to disclose information that is unconnected to taxation can really fit within the bounds of the taxation power. Rather, Bill C-377 impacts on provincial jurisdiction without any aspect of the legislation actually being about taxation.

43. While it is true that the *Income Tax Act* grants certain benefits to unions and their members, if that fact is sufficient to justify the Federal Parliament's intrusion into the jurisdiction of the provinces as represented by Bill C-377, it is hard to imagine what aspects of labour relations would be off-limits for the Government of Canada.

44. Bill C-377 represents overt Federal interference with the labour relations regimes of the provinces, and will certainly be subject to constitutional challenge on that basis if the Bill becomes law.

## VI. Conclusion and Recommendations

45. We believe that we have identified several deeply problematic aspects of Bill C-377.

    - Bill C-377 impacts on solicitor-client privilege and confidentiality, and offends the principle that solicitor-client privilege should be practically absolute and that

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[13] [1925] A.C. 396.

[14] Constitution Act, 1867, s. 92(13).

lawyers cannot render "effective professional services" to clients unless there is "full and unreserved communication between them".

- Bill C-377 infringes the freedom of association protected by s. 2(d) of the Charter, insofar as it interferes with the collective bargaining process, exacerbates existing power imbalances, and represents prejudicial and unequal treatment of people just because of the type of organization they belong to.

- Bill C-377 does not accord with the values that freedom of expression is meant to protect. The compelled public disclosure of various aspects of the political speech of unions and their members likely infringes section 2(b) and it is clearly in conflict with the spirit of the provision.

- Bill C-377 similarly prejudices the interest that section 8 of the *Charter* is meant to protect, namely the right to privacy.

- Bill C-377 represents a troubling incursion on the jurisdiction of the provinces, and appears to be ultra vires the Federal Parliament.

46. The Bill's impact on solicitor-client privilege and confidentiality could be mitigated through amending the Bill to exempt the disclosure of information on legal activities, but the Bill's impact on provincial jurisdiction, freedom of expression, freedom of association and the right to be free from unreasonable search and seizure cannot be overcome without a wholesale rejection of the Bill.

47. We submit that Bill C-377 is an offensive piece of legislation which does not accord with the values that Canadian society is supposed to uphold, is fatally flawed, and the proper solution is for it to be rejected in its entirety.